METALDEK INDUSTRIES SDN BHD

v.

KAMARUDDIN TOKIMON & ORS

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: 16-6-97]
6 OCTOBER 1998

LABOUR LAW: *Employment - Contract of employment - Terms and conditions of service - Company shifting business premises - Whether a transfer or a relocation - Whether such an exercise envisaged in employment contract - New premises non-existent at time contract was entered into - Right to transfer - Whether can be implied*

LABOUR LAW: *Employment - Termination benefits - Employees refusing to be relocated - Whether tantamount to misconduct - Whether entitled to termination benefits - Employment (Termination and Lay-Off Benefits) Regulations 1980, reg. 4(1)(b) - Whether services were terminated by employer - Employment Act 1955, s. 12(3)*

The appellant relocated its sole factory at Shah Alam to Ipoh which commenced operations on 1 March 1995. It informed the respondents of the matter and paid them full wages for February 1995 plus payments for the balance of annual leave and unutilised medical leave. The last day of work at the Shah Alam factory was 28 February 1995. The respondents refused to report for work in Ipoh but instead filed for termination benefits at the Labour Department. The senior labour officer ('the SLO') ordered the appellant to pay the respondents termination benefits totalling RM194,122.05.

The appellant contended that termination benefits should not have to be paid. It argued that the respondents had abandoned their jobs when they refused to report for work in Ipoh. Accordingly, by virtue of reg. 4(1)(b) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations'), the respondents were not entitled to such payments.

The respondents contended that the appellant had no right, either express or implied, to effect the change in work place. Further, that the appellant was aware that the respondents were not going to report to work in Ipoh. In addition, the appellant did not issue the respondents termination letters or take any action against them.

Held:

[1] The movement of an employee from one place of work to another may be due to a transfer or a relocation of the business premises. A transfer involves the movement of the employee within the divisions of the organisation which have been established at the time the contract between the parties were concluded, and is distinguishable from a relocation of the business premises itself.

[2] The appellant had effected a relocation rather than a transfer as it had moved its sole business premises and its undertakings from Shah Alam to Ipoh.

[3] An employer has a right to shift its employees from one place to another, such a right being an incident of service. However, this right cannot be implied into situations where the branches or premises were non-existent at the time of the making of the contract.

[4] There was no express right of transfer in the contract of employment of the respondents, nor was there an implied right as the factory in Ipoh only became operational after the contract between the parties was entered into.

[5] The payments made to the respondents on 28 February 1995 pointed to the conclusion that the appellant had terminated the services of the respondents. It was aware that the respondents refused to work in Ipoh.

[6] The distance between the two factories was about 250km. This would cause considerable inconvenience to the respondents, who would have to either move their families to Ipoh or leave them in Shah Alam.

[7] Regulation 4(1)(b) of the Regulations specifically disentitles an employee to the payment of any termination benefits if he is dismissed. The said regulation, however, allows him to claim such payments if he is terminated for any reason other than contractual retirement, dismissal for misconduct or voluntary resignation.

[8] The respondents were justified in regarding themselves as terminated from their services by virtue of s. 12(3) of the Employment Act 1955. Accordingly, they were entitled to termination benefits in the quantum stipulated in reg. 6 of the Regulations as they were not disqualified by any of the reasons set out in reg. 4 thereof.

[Appeal dismissed with costs.]

Case(s) referred to:

All Malayan Estate Staff Union v. Golden Hope Plantations Bhd & Anor [1994] 2 MLJ 699 ***(refd)***

Hotel Perdana Kelantan v. National Union of Hotel, Bar and Restaurant Workers [1987] 2 ILR 330 ***(refd)***

Kumpulan Guthrie Sdn Bhd v. Valaithan (Award No: 216/91) ***(refd)***

O'Brien v. Associated Fire Alarm Ltd [1996] 1 WLR 1916 ***(refd)***

Palace Garment Manufacturing Sdn Bhd Butterworth v. Penang & S Prai Textile & Garment Industries Employees' Union [1984] 2 ILR 506 ***(refd)***

Police Court Case Gampola No: 23847 (1873) 2 Renier's Appeal Cases 1314 ***(refd)***

Radtha Raju & Ors v. Dunlop Estates Bhd [1996] 1 CLJ 755 ***(refd)***

Legislation referred to:

Employment Act 1955, ss. 12(3), 69

Employment (Termination and Lay-Off Benefits) Regulations 1980, regs. 3(1), 4(1), 6

Other source(s) referred to:

Employees' Misconduct, Alfred Avins, p 245

Industrial Law, IT Smith & JC Wood, 5th edn, p 413

Labour Law, John Bowers & Simon Honeyball, 2nd edn, pp 114-5

Misconduct in Employment, Ghaiye BR, 2nd edn, p 276

For the appellant - M Shamini; M/s Ramadass & Assoc

For the respondents - A Murugavell; M/s Murugavell Arumugam & Co

Reported by Maheswaran Murugasen

JUDGMENT

Faiza Tamby Chik J:

The senior labour officer, Pelabuhan Kelang, made an order on 20 September 1995 that the appellant in this case paid the respondents a total sum of RM194,122.05 being termination benefits as claimed by the respondents (p. 20 Rekod Rayuan (RR)). This is an appeal against the whole of that decision by the appellant.

The claims to the termination benefits, which arose under the Employment (Termination and Lay-Off Benefits) Regulations 1980 were made under s. 69 of the Employment Act 1955.

The Relevant Facts

The respondents were employed by the appellant company on various duties, positions and salaries, to work at its sole factory in Shah Alam. The appellant, by a notice dated 17 September 1994, informed the respondents that the business premises would be relocated to Ipoh, Perak

around 1 December 1994 (p. 25 – RR). By a further notice dated 27 September 1994, the appellant confirmed that the relocation to Ipoh would not involve any changes to the other terms and conditions of employment of the respondents. (p. 27 – RR). The respondents were finally instructed by a notice dated 24 February 1995 that the shifting of the premises had been completed and that the appellant should report for work in Ipoh on 1 March 1995. (p. 25 – RR).

The respondents worked in the Shah Alam factory until 28 February 1995 on which day, the appellant paid the respondents full wages for February 1995 together with payments for balance of annual leave and unutilised medical leave.

The respondents did not report to the new factory in Ipoh on 1 March 1995 but instead filed their claims for termination benefits in the Labour Department in Port Klang.

It is in evidence that the respondents had informed the appellant that they would not report for work in Ipoh (p. 11 – RR). It is also in evidence that the appellant knew that the respondents did not want to go to Ipoh (p. 17 – RR). No letter of termination was issued to the respondents, nor any form of action taken against them for not reporting for work in Ipoh. There were no written Terms and Conditions of Employment (p. 19 – RR)

The Issues

The issues are:

(i) The appellant's right to relocate their business premises;

(ii) The effect of such a relocation on the contract of employment of the respondents with regard to s. 12(3) of the Employment Act 1955.

(iii) Consequent entitlement to Termination Benefits under regs. 4 & 6 of the Employment (Termination and Lay-off Benefits) Regulations 1980.

Transfer/Relocation

It must be noted that the movement of an employee from one place of work to another may be due to a transfer or a relocation of the business premises. In *All Malayan Estate Staff Union v. Golden Hope Plantations Bhd & Anor* [1994] 2 MLJ 699, the High Court held:

> Since the Minister's reference concerned the relocation of the employees, the issue of transfer was outside the scope of the reference. Therefore the Industrial Court had correctly confined itself to the issue of relocation.

The right to transfer an employee was stated in Industrial Court Award No. 314/87 between *Hotel Perdana Kelantan v. National Union of Hotel, Bar and Restaurant Workers* [1987] 2 ILR 330 at p. 331 as:

> It is well settled that the right to transfer an employee from one department to another, or from one post of the establishment to another or from one branch to another is the prerogative of the Management.

In short a transfer involves the movement of any employee within the divisions of an organisation which have been established at the time the contract between the parties were concluded and is distinguishable from a relocation of the business premises itself. Ghaiye B.R. in his book – *Misconduct in Employment* (2nd edn) at p. 276 submitted that a shifting of place of business does not amount to a transfer. That is, a transfer as illustrated from the three situations above, is totally different from where an employer shifts his place of business or his undertakings from one place to another, ie, relocation.

For the above reasons, I am of the opinion that in the present case the company has elected a relocation rather than a transfer as they have moved their business premises and their undertakings from their factory in Shah Alam to Menglembu, Ipoh, Perak. Having established that I shall examine the first issue, ie, on the rights of an employer to relocate his business premises with regards to his employees.

Right To Relocate

The general rule is that an employer has a right to shift the employees from one place to another and that this right is an incident of service. The employer has an inherent right to choose the place of business. Ghaiye B.R. in his book *Misconduct in Employment* (2nd edn) at p. 276 submitted that "When an employer shifts his place of business or his undertaking from one place to the other, the workmen cannot claim extra travelling allowance. This does not amount to transfer. The costs of travelling can be made an express stipulation in the contract of employment but in the absence of express stipulation it is not an implied term because otherwise the employees would be in a position to unilaterally alter such expenses of travelling by the choice of the place of their residence. The employment commences when the employee reaches his place of work which is the base of operation. An employer has an inherent right to choose the place of business and if some of the employees are required to incur additional expenses it does not entitle them to claim extra benefit."

However, the effect of a relocation on the employees is a different matter.

It is observed that the facts in the present case did not denote the existence of any express terms contained in the contract, the issue then would be whether a clause should be implied on the effect of the relocation on the employees. In *O'Brien v. Associated Fire Alarm Ltd* [1996] 1 WLR 1916 CA, the employees refused to work in another factory at a different location when the place they were presently working closed down. Their claim for redundancy payments nevertheless were upheld by the Court of Appeal where it was held:

(i) the question whether a term was to be implied in a contract was a question of law and, accordingly, was open to review by an appellate tribunal (see p. 95 letter H, p. 97, letter C, and p. 98, letter H, post);

(ii) Since it had not been shown by the company that there was an implied term that the employees could be sent anywhere in the area, the tribunal's decision to that effect should have been reversed on appeal (see p. 96, letter B, and p. 98, letters A and G, post); hence

(iii) The employees were therefore presumed by virtue of s. 9(2)(b) of the Redundancy Payments Act 1965, to have been dismissed by reason of redundancy (see p. 95, letter D, and p. 98, letters D and F. post). Appeal allowed.

It is therefore necessary to evaluate the following:

(a) the distance of the old and new premises, and

(b) the resultant inconvenience caused to the employees affected.

Thus the question is whether the degree of the forced change is fundamental enough to breach the contract.

In addressing the issue of distance, it must be noted that the company is moving from Shah Alam to Menglembu, Ipoh. This involves a distance of roughly 250 km. In a textbook on *Labour Law* (2nd edn) by John Bowers and Simon Honeyball, the writers submitted at pp. 114-5:

> Whether a forced change in the place of work (see *Hawker Siddely Powers Engineering Ltd v. Rump* [1979] and *Courtaulds Northern Spinning Ltd v. Sibson* [1988] is a fundamental enough breach of contract 'is a question of degree to be determined according to all the circumstances such as the nature of the work, the circumstances in which it is performed and the circumstances of the place to which the work is to be transferred'. Thus neither the move of Times Newspapers from Printing House Square to Grays Inn Road (*Times Newspapers Ltd v. Bartlett* [1976], nor of a restaurant from Holborn to Regent Street was a fundamental breach of contract (*Managers (Holborn) Ltd v. Hohne* [1977]).

These two cases illustrate that if the distance between the old and new working premises is not very far apart, then it would not amount to a fundamental breach.

In *Kumpulan Guthrie Sdn Bhd v. Valaithan* (Award 216/91 at p. 9) it was held that it would be unreasonable to justify the transfer ordered by the employers as this would entail an uprooting of the employees' families. This was due to the fact that the distance involved a movement of some 40-60 miles (64-96 km) away from their present place.

The present case involves a relocation of roughly 250km to the new factory in Menglembu, Ipoh. I am of the view that in the context of Malaysia the distance of 250km should cause a considerable amount of inconvenience to the claimants and their families. It can be reasonably contemplated that the claimants would either have to move their families to Menglembu or leave them in Shah Alam.

In *Police Court Case, Gampola, No: 23847* affirmed by the Ceylon Sup. Crt. (1873) in 2 Renier's Appeal Cases 1314, a person with a family dependant on him, cannot be reasonably expected to leave that family and continue his service elsewhere when at the time of hiring, such separation could not be contemplated. Furthermore, in *Australiasian Meat Ind Union v. E.B. May & Co*, 5th Aust. Ind. Info. Bull. 944 (Bd. Of Ref 1950), it was stated that where a contract provided for work at one location, a transfer to another city may be ignored with impunity as an illegal order.

Effect Of Relocation

In the case of *Palace Garment Manufacturing Sdn Bhd Butterworth v. Penang & S. Prai Textile & Garment Industries Employees' Union* (Award No. 119 of 1984) it was stated (at p. 3) that in matters involving relocation to another town, the closure of the factory at the previous site would render the services of the employees redundant at that factory. It was immaterial that their services were still required at the new factory. This reasoning was coupled with the court's finding that there was no provision, either express or implied, to justify transferring the employees from one factory to another. It was held (at p. 4) that the employees were entitled to retrenchment benefits under the Employment (Termination & Lay-Off Benefits) Regulations 1980.

In the present case there is no expressed right of transfer in the contract of employment of the respondents. When the respondents commenced employment, the factory operated only in Shah Alam without any branches. A right of transfer cannot be implied to branches or premises that were non-existent at the time of the making of the contract. In fact, in this case

the factory in Ipoh became operational only some months prior to the termination of the respondents. Writer Alfred Avins at p. 245 on *Employees Misconduct* states:

> The Indian Courts, the only ones which have passed on the point, have held that when an employee is hired by a firm with no branches, there is no implied contract which permits his transfer to a branch thereafter established.

Section 12(3) of the Employment Act 1955 clearly envisages a situation where an employee is terminated in similar circumstances as this case where there is neither an expressed nor implied right of transfer:

> the employee has refused to accept his transfer to any other places of employment unless his contract of service requires him to accept such transfer and **Section 12(3)(b) & (d) Employment Act provides**:
>
> (3) Notwithstanding anything contained in sub-s. (2), where the termination of service of the employee is attributable wholly or mainly to the fact that:
>
> (a) ...
>
> (b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;
>
> (c) ...
>
> (d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish
>
> (e) ...
>
> (f) ...
>
> The employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2)(a), (b) or (c) as the case may be, regardless of anything to the contrary contained in the contract of service.

In the light of the above, I am of the view that the respondents in the present case should be considered redundant, and in the result be entitled for Termination Benefits accordingly. I.T. Smith & J.C. Wood's *Industrial Law* (5th edn) at p. 413 submitted that where a contract does not envisage working in the new location the employee has a *prime facie* claim for redundancy based upon closure of the factory.

In the present case the appellant contended that the respondents were not terminated by them and that therefore the respondents left on their own accord. In *Radtha d/o Raju & Ors v. Dunlop Estates Berhad* [1996] 1 MLJ 561, the Court of Appeal held that a notice of termination was mandatory under s. 12(3) of the Employment Act 1955. That case involved s. 12(3)(f) of the Act and it was the decision of the Court of Appeal that a change of ownership of the business amounts to a termination of service. Similarly here a change in the place of employment, on the facts of this case, amounts to a termination of service and the appellant are required in law to issue a notice of termination. I cannot accept the inaction of the appellant by merely keeping quiet and not issuing a notice of termination thinking they are absolved of all obligations in law to pay Termination Benefits.

The appellant paid full wages to the respondents on the last day of their employment in Shah Alam (28 February 1995). The appellant also paid the respondents for all balance of annual leave due to them and unconsumed portion of the sick leave entitlement on that day. This fact can only point to the conclusion that the appellant were terminating the services of the respondents on 28 February 1995. If the respondents were being dismissed for refusing to report to the new factory in Ipoh or were being held to have abandoned their employment on their own accord, such payments would indeed have not been made. The appellant knew on 28 February 1995 that the respondent were not going to report for work in Ipoh on 1 March 1995 as the respondents worked on 28 February 1995 and could not have reported the next day to Ipoh. Yet they were paid the amounts stated above. The appellant had thereby terminated the services of the respondents and are required to also pay the Termination Benefits as ordered by the senior labour officer.

The respondents are entitled to be paid termination benefits in the quantum stipulated in reg. 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 as they are not disqualified by any of the reasons set out in paras (a), (b) and (c) of reg. 4. The respondents are entitled to hold themselves as terminated from their services by virtue of s. 12(3) of the Employment Act 1955 in that:

(i) **12(3)(b) & (d)**

The Respondents were contracted to work in the Shah Alam Factory and the appellant have ceased to carry on the business in that place. Thus the requirements for the kind of work the respondents were employed for has also ceased in the place where they contracted to work.

(ii) **12(3)(e)**

> There was no right of transfer, either expressed or implied, in the contract of employment between the parties and as such the Respondents were entitled to refuse to go to Menglembu Ipoh.

I come to the conclusion that respondents were entitled to refuse a relocation to a place which is more than a daily travelling distance from their home. They were entitled to refuse the move from Shah Alam to Ipoh. The result of such refusal amounts to the termination of their services under s. 12(3) of the Employment Act 1955 and the 1980 Regulations. The appellant terminated the services of the respondents on 28 February 1995 by paying them their full wages and balance of annual leave and medical leave up to that day, it is well within the law to conclude that the relocation involved so fundamental a change to the terms of their contract that the respondents were entitled to hold themselves terminated. The appellant had clearly accepted this position in paying all the contractual benefits due to the respondents, but leaving out the statutory benefits.

The appellant main submission had turned on the interpretation of the words, "tidak diberhentikan kerja" and "perkhidmatan telah ditamatkan" as used by the senior labour officer. According to the appellant both these phrases means "terminated". My view is that the words "tidak diberhentikan kerja" means (they were) not stopped from work. In other words (they were) not dismissed. The words "perkhidmatan mereka telah ditamatkan" means their services ie, the services of the respondents were terminated. This is crucial as reg. 4(1)(b) of the Employment (Termination and Lay-Off Benefit) Regulations 1980 specifically disentitles an employee to the payment of any termination benefits if he is dismissed. The said regulation, however, entitles the employee to such a payment if he is terminated for any reason other than contractual retirement, dismissal for misconduct or voluntary resignation. The senior labour officer was therefore not being illogical or perverse in her finding that the respondents were not dismissed, but were terminated due to the relocation of the appellant from Shah Alam to Ipoh. Her finding is in perfect consonance with regs. 3(1) and 4(1) of the 1980 Regulations.

For these reasons the appeal is dismissed with costs.